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SEP 13 2002

In re Application of  
Jensen, et al.  
Application No. 10/044,158  
Filed: January 11, 2002  
Attorney Docket No. 10209.388  
For: FREEZE CONCENTRATION  
PROCESS

OFFICE OF PETITIONS

DECISION GRANTING  
PETITION

This is a decision on the petition under 37 CFR 1.53(e), filed July 11, 2002, requesting in effect, withdrawal of the Notice of Incomplete Nonprovisional Application, mailed June 3, 2002.

The application was filed on January 11, 2002. On June 3, 2002, the Office of Initial Patent Examination mailed a Notice informing petitioners that no filing date had been accorded to the application papers deposited on January 11, 2002 because no drawing was present, as is required by 35 USC 113.

In response to the Notice, petitioners timely filed the present petition. Petitioners argue that a January 11, 2002 filing date should be accorded to the above-identified application because a certificate of mailing by Express Mail and the transmittal letter filed with the patent application on January 11, 2002 indicated the inclusion of drawings.

Petitioners are advised that a certificate of mailing cannot be relied upon to obtain a filing date. 37 CFR 1.8(a)(2)(I)(A). In addition, the provisions of 37 CFR 1.10(e) cannot be utilized to prove the contents of a mailing. MPEP 513 states, "Where there is a dispute as to the contents of correspondence submitted to the Office,...an applicant may not rely upon the provisions of 37 CFR 1.10(e) to establish what document(s)... were filed in the Office with such correspondence. Rather, where the records of the Office (e.g. the file of the application) contain any document(s)... corresponding to the contents of the correspondence at issue, the Office will rely upon its official record of the contents of such correspondence in absence of convincing evidence (e.g., a postcard receipt under MPEP 503 containing specific itemization of the document(s)... purported to have been filed with the correspondence at issue) that the Office received and misplaced any document(s).. That is not among the official records of the Office."

A properly itemized return postcard constitutes *prima facie* evidence that the items were filed on the date stamped thereon. Unfortunately petitioners have not submitted an itemized postcard receipt.

While petitioners' arguments are not persuasive, another avenue for the requested relief is available. It is noted that the above-identified application contains method claims. As stated in MPEP 601.01(f), it is the practice of the PTO to treat an application that contains at least one process or method claim as an application for which a drawing is not necessary for an understanding of the invention under 35 USC 113 (first sentence.)

MPEP 601.01(f) also states that:

A non provisional application having at least one claim, or a provisional application having at least some disclosure, directed to the subject matter discussed above for which a drawing is usually not considered essential for a filing date, describing drawing figures in the specification, but filed without drawings will be treated as an application filed without all of the drawing figures referred to in the specification as discussed in MPEP 601.01(g), so long as the application contains something that can be construed as a written description.

This application contains exclusively method claims. Therefore, the above-identified application should have been treated as an application filed without all of the drawing figures referred to in the specification as discussed in MPEP 601.01(g).

MPEP 601.01(g) states that if an application is filed without all of the drawing figures referred to in the specification, a "Notice of Omitted Items" is mailed indicating that the application has been accorded a filing date.

In view of the above, the "Notice" mailed June 3, 2002 was mailed in error and is hereby withdrawn.

The petition under 37 CFR 1.53(e) to accord a January 11, 2002 filing date is **granted**.

However, the three sheets of drawings filed on July 11, 2002 will not be entered at this time. Petitioners have several options: (1) Petitioners may submit an properly itemized date stamped postcard receipt showing that the Office received the drawings in question on January 11, 2002. (2) Petitioners may decide that the drawings are not necessary for the understanding of the invention. In this case, petitioners should file a Preliminary Amendment deleting all references to the omitted figures. (3) Petitioners may decide that they would like to include the drawings for examination purposes. In this case, petitioners should file a Preliminary Amendment requesting entry of the drawing figures filed on July 11, 2002. The examiner of record will examine the drawings for new matter.

Pursuant to petitioners' authorization, deposit account no. 50-0843 will be credited the \$130.00 petition fee.

The application is being returned to the Office of Initial Patent Examination for further processing with a filing date of January 11, 2002.

Telephone inquiries specific to this matter should be directed to the undersigned at (703) 308-6712.

  
E. Shirene Willis  
Senior Petitions Attorney  
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for Patent Examination Policy